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Wickersham, George Woodward

Government by administrative

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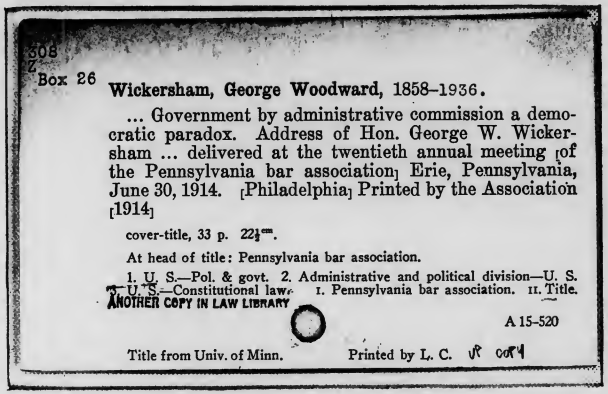

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PENNSYLVANIA BAR ASSOCIATION

Government by Administrative Commission
A Democratic Paradox

Address

of

Hon. George W. Wickersham

Of New York

Delivered at the

Twentieth Annual Meeting

Erie, Pennsylvania

June 30, 1914

Printed by the Association

GOVERNMENT BY ADMINISTRATIVE COMMISSION, A DEMOCRATIC PARADOX.

All over the world, the process of the democratization of society and government steadily is making headway. England, despite its historic ornaments of royalty and aristocracy, has gone further, perhaps, than France or any other country in so moulding her government as to make it immediately responsive to popular feeling, while Italy, Spain, and even Germany, are following closely on her heels. In our own country, the introduction, as new discoveries, of those aids to popular government which the French of the Revolution, at the instance of J. J. Rousseau, borrowed from the small communities of ancient Greece—such as the initiative, the referendum and the imperative mandate; provisions requiring the nomination, as well as the election of officials of government by the exercise of a suffrage made universal by including women; the recall of all officials, including judges, by popular vote, to make sure that not only lawmaking, but the interpretation and the enforcement of law shall constantly accord with the popular will;—these, and other incidents to purely popular government have made rapid headway as parts of the constitutional government of an increasing number of States of the Union.

So rapid has been the spread of these modifications of governmental structure, that fears have been openly expressed by some, that the cycle of Democracy is running swiftly towards the inevitable cataclysm which in all past history has been the ultimate result of unrestrained popular government, out of which always has arisen a new absolutism. In this connection, attention has been drawn to the increasing tendency of our people to follow individual leadership, condoning all faults of method, manners or morals, in admiration of a dominating personality, and the

complete subjection of the present Congress of the United States to the will of the President, is pointed to as an illustration of that spirit of indifference to the fundamental principles of Republican government, which prepares the way for the overthrow of free institutions and the substitution of a powerful executive in the place of the distributed powers of government among equal and coördinate branches, by which alone, it long has been thought, true popular liberty can be preserved.

But it is a curious characteristic of Anglo-Saxon institutions that they are never developed to their logical conclusions. The rigid logic which finds expression in the Code Napoléon and other systems of Continental Law, has never characterized the development of the institutions of English-speaking peoples. The common law was but the judicial expression of the popular conception of right conduct in the affairs of daily life colored, it is true, from time to time, by the interests of a dominant class, but on the whole, expressive of the best ethical standards of all the people, and in its unwritten character flexible enough to meet their changing needs, except in the comparatively rare instances where the Legislature intervened to furnish new rules to meet new conditions which demanded more immediate remedies than the slow process of judicial construction could supply.

While the ideal of English jurisprudence always has disclaimed a power in the judges to make the law, or in Legislature a power to interpret or execute it; as a matter of fact, the exercise by the judiciary of the function of interpretation frequently has been undistinguishable from that of law-making, while the Parliament not only has been historically a court, but the House of Lords at the present time is the court of last resort in important judicial controversies arising within the four seas, and the Judicial Committee of the Privy Council—an administrative body—keeps the respective Colonial governments within their

appointed orbits, and the Colonial law in harmony with that of England, by sitting in review of the judgments of the Colonial courts. The executive power of the realm is actually vested in that Committee of the House of Commons, which for the moment constitutes the ministry and wields that power in the name of the sovereign.

The most explicit formulation of the American ideal of government at the time of our separation from Great Britain, is that expressed in the Constitution of the State of Massachusetts in the following well-known and oft-quoted language:

> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men."

Mr. Bryce once said that the written constitutions of America were designed to supply the lack of that tradition which in England kept the different branches of government within their appropriate spheres and restrained the Legislature from overriding all the barriers which Magna Charta and the Bill of Rights had erected for the protection of individual rights.

The barons of King John's day and the squires and burgesses of the Seventeenth Century, dealt with the power of the executive—the King, as the serious menace to the freedom of the individual. The framers of the American constitutions apprehended tyranny on the part of popular majorities, and sought to avert it by bills of rights, and by distributing the great powers of government as expressed in State and National constitutions, so as to prevent the undue concentration of authority in any hand. "Wherever the real power in a government lies," wrote Madison to Jefferson in October, 1788.[1]

[1] II Watson on the Constitution p. 1358.

"there is the danger of oppression. In our governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. * * * Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince."

How far the force of tradition has become impaired in England, is foreign to the purpose of this paper; but certainly the ideal of the complete separation of powers of government, expressed in the early Constitutions of the American States, and embodied in that of the Union, is remote from the theories which characterize the Constitutions and Constitutional Amendments of many of the States adopted during the last decade. That ideal is also foreign to the theories underlying the establishment of modern governmental Commissions.

America has been called appropriately the land of paradoxes, and, at the very moment when the tide of Democracy is running most strongly, and, with seemingly irresistible force sweeping away all barriers to popular legislation; reducing judges to the state of mere puppets to give expression to the popular will; exalting the police power above all constitutional restrictions or safeguards in bills of rights, and threatening to reduce the Fourteenth Amendment of the Federal Constitution to a counsel of perfection, there is growing up a system of government by administrative commission which, involving, it is true, in large measure, an obliteration of the lines of demarcation between governmental powers, is yet supplying a corrective to unrestricted democracy, which may not only maintain unimpaired efficient government in State and nation, but bring government to a state of practical efficiency hitherto unrealized.

In almost every State of the Union, commissions are being created for various governmental purposes, clothed with extensive powers, appointed by the Executive to hold office for terms of years so graduated that the personnel of the Commission cannot be changed abruptly; and public sentiment generally has favored the reappointment of members of these bodies as their terms of office expire.

"It is the blending of democracy and aristocracy," says Emile Faguet, "that makes a good constitution."[2] The right to enter into the magistracy, he says, quoting Aristotle, is a democratic principle; to admit none but distinguished citizens, is an aristocratic principle. And he characterizes as aristocrats, those who desire knowledge and who accept and love responsibility.[3]

The selection by the President, or by governors, of men of special qualifications to compose commissions created to administer various powers devolved upon them by legislatures, involving the exercise of great responsibility, with official terms of office so arranged that changes in individual membership are gradual and do not impair the continued existence of the official body, is the recognition and application of an essentially aristocratic principle, exhibiting a paradoxical result which contrasts strangely with the prevailing current of Democracy, but which also manifests in a striking degree that good sense of the Anglo Saxon race which, when confronted with an exigency, always devises an appropriate expedient to meet the need, in entire disregard of logic or consistency.

The power of centuries of aristocratic tradition has been insufficient to stay the rapid modification of English institutions (outside the judiciary) in the direction of pure Democracy. The most explicit provisions of written constitutions in America have not resisted the judicial alchemy

[2] Le Culte de l'incompétence, p. 227.

[3] "Et l'horreur des Résponsabilitès p. 200.

when found obstacles to the necessary development of government to counteract tendencies which threaten its stability and efficiency.

The theory of the distribution of powers involves as a corollary that powers shall be exercised only by those upon whom they are conferred. Therefore it long since became one of the settled maxims of Constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.[4] A law is a rule of conduct governing the future behavior of those to whom it is made applicable.[5] It is the function of the people, or of the legislature to prescribe this rule. The force of the *unwritten* law which our ancestors brought with them from England rests upon the express declaration of the people in their constitutions of government, or upon immemorial usage which affords a presumption of its adoption by the people as a rule of action. But while it is for the legislative power to declare what the law is; it is for the judicial power to interpret the law in its application to facts presented in cases and controversies from time to time arising, and to determine whether or not the legislature has exceeded the limitation of its power set by the people in the Constitution of the State or nation. The American theory of government has substituted arbitrament by selected competent judges for appeal to insurrection or revolution in preserving minorities from that danger of oppression of which Madison wrote.

As a natural consequence, attempts by the legislature to devolve upon the courts or upon executive officers, powers which in their nature appear legislative, frequently have been challenged in the courts. There have resulted certain lines of decisions, not always logical or

[4] Cooley's Const. Lim. 4th ed. pp. 110, 111.
[5] *L. & N. R. R. Co. vs. Garrett*, 231 U. S. 298, 305.

easily reconcilable, but which on the whole have exhibited a very clear comprehension of the difference between declaring a general principle of law, and applying principles so declared to complex and fluctuating circumstances, and a broad statesmanlike effort by the courts to reconcile theory with the practical requirements of government. In this effort, the courts have held almost uniformly that a legislative act need not be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event.[6] By the line of decisions beginning with *Field vs. Clark*,[7] and running down to *United States vs. Grimaud*,[8] and *Interstate Commerce Commission vs. Goodrich Transit Co.*,[9] the Supreme Court of the United States has left Congress with a broad discretion as to the nature and extent of powers which it may devolve upon a board or commission. The great increase in population, and the increasing number and complexity of questions arising for the consideration of Congress, for some time past has made it perfectly apparent that the ordinary machinery of legislation was wholly insufficient to deal with many matters properly within legislative cognizance, but which require continuous and systematic study and supervision in order that an attempt at a remedy may not entail more evil than that sought to be remedied. Even a legislative body which continues in session throughout the year, can hardly provide for raising the necessary expenses of a government which costs nearly one billion dollars annually, pass intelligently upon upwards of thirty thousand proposed laws, fix railroad rates and practices, investigate and control banking, industrial and

[6] Cooley: Const. Lim., 4th ed., p. 142; McGhee, "Due Process of Law" pp. 303, 164.
[7] 143 U. S. 649.
[8] 220 U. S. 506.
[9] 224 U. S. 194.

commercial business, and deal with the other matters affecting the welfare of the country which require expert knowledge and training.

While none would contend that mere expediency should influence the Courts to sanction measures clearly contrary to the fundamental law, yet doubtful questions very properly may be resolved by the necessities of the case, and a court may be—and indeed should be,—astute to sustain as within constitutional warrant, measures of government which furnish the only feasible method of dealing intelligently and effectively with problems in which all the people are vitally interested.[10]

Fortunately, there are well-settled principles of constitutional construction upon which may be rested the validity of the most important examples of Administrative Commissions.

Thus, from the foundation of the Government, a general exception to the rule against delegating legislative powers has been recognized in the case of municipalities and other political subdivisions of government; and by-laws or ordinances enacted by bodies of this character in the exercise of power delegated to them by the Legislature have been recognized as having the force of law.[11]

In *Fischer vs. St. Louis*,[12] the Supreme Court of the United States not only recognized the power of a municipality when authorized by the law of a State to make general police regulations, but affirmed the right of the Legislature to delegate to it the discretion of granting exceptions to those regulations, holding that the fact that in the exercise of that power some might be favored and others not, would not, if the ordinance were otherwise constitutional, deny to those who are not favored the equal protection of the law.

[10] See REDFIELD, *C. J.* in *State vs. Parker*, 26 Vt. 357.
[11] Cooley's Const. Lim. 7th ed. pp. 264-6.
[12] 194 U. S. 361.

Even in Massachusetts it is held that the Legislature may establish in different cities different kinds of government, different officers and different modes of electing them; and that although the Legislature may not, within the limitations of the State Constitution, adopt the initiative and the referendum with respect to *general* laws, it may constitutionally empower the town governments to adopt these provisions with respect to *local* ordinances.[13]

It is true that this conclusion was based largely upon immemorial usage in town government in Massachusetts, but it is none the less interesting as establishing an important exception to the general rule embodied in the Constitution of the State.

From an early day, too, the Supreme Court of the United States has recognized the power of Congress to confer upon administrative officers of the Government a variety of powers which must be exercised in a judicial manner; and upon courts, certain powers strictly legislative in character, but which, because of the necessity for investigation of a judicial nature, Congress has concluded a court could deal with more effectively than a mere administrative body.

In *Murrays Lessee vs. Hoboken Land and Improvement Co.*,[14] the Supreme Court sustained the validity of an Act of Congress which empowered the Solicitor of the Treasury without the intervention of a court to issue a warrant and levy upon the property of a Collector of Internal Revenue to recover a balance due by him to the Government.

The Supreme Court has also sustained the constitutionality of the Acts of Congress empowering the courts to review the determination of the Commissioner of Patents upon application for a patent for a new and useful invention, saying:

[13] *Graham vs. Roberts*, 200 Mass. 152.
Brodbine vs. Revere, 182 Mass. 598.
[14] 18 How. 272.

"The competency of Congress to make use of such an instrumentality or to create such a tribunal in the attainment of the ends of the Patent Office seems never to have been questioned, and we think could not be successfully. The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal."[15]

So with respect to the admission or expulsion of aliens, it has been held that the power of Congress to expel,

"like the power to exclude aliens or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. * * * It is no new thing for the law making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions not necessarily of judicial cognizance either to the final determination of executive officers or to the decision of such officers in the first instance with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."[16]

In the case of *United States vs. Grimaud*,[17] the Court admitted the difficulty of defining the line which separates legislative power to make laws, from administrative authority to make regulations; but the opinion pointed out that

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up

[15] *Butterworth vs. Hoe*, 112 U. S. 50; *U. S. vs. Duell*, 172 U. S. 576.

[16] *Fong Yue Ting vs. U. S.*, 149 U. S. 698. See also *Nishimura vs. U. S.*, 142 U. S. 651.

[17] 220 U. S. 506.

the details' by the establishment of administrative rules and regulations, the violation of which could be punished by a fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done."

One of the most notable examples of the delegation of power in the Legislature, is furnished by what is called "Commission Government" of cities and other municipalities. The rapid spread of this form of municipal government is another paradoxical result of widening Democracy.

The cardinal principle of Democracy is, as the late E. L. Godkin once wrote, "a profound belief in the wisdom as well as the power of the majority, not on certain occasions, but at whatever time it is consulted." Another characteristic of pure Democracy is a profound distrust in special preparation or fitness as a qualification for public office. Yet since the establishment of the Commission government of the City of Galveston, following the destruction of that city by the tidal wave in 1901, the adoption of that form of government has spread with such force and with such demonstrated results, that according to a recent report of the Director of the Census Bureau, 69 cities out of 195 in the United States which have an estimated population of upwards of 30,000 each, have adopted a Commission form of government.[18] These cities too are scattered in twenty-three different States, as widely separated as New Jersey and California, Massachusetts and Louisiana, Pennsylvania and Texas. The characteristic of this type of city government is that its affairs are administered by a small number of elected officials, exercising both legislative and executive power, and by whom all other officials are appointed. Mr. Clinton Rogers Woodruff, in his valuable book on "City Government by Commission,"[19] summarizes the advantages

[18] *New York Evening Post*, June 12, 1914.

[19] Appleton & Co., 1911.

of this system as being its "Simplicity and directness," which, as he truly says, "beget efficiency in the hands of competent men."

> "A concise, easily understood frame of government takes the place of a complicated one, or what is worse still, a long series of conflicting, over-lapping, often antiquated and usually complex, acts of Assembly."

Competent men are secured through this system by the short ballot, on which are the names of a very few men—Commissioners or Directors. It is utterly hopeless, Mr. Woodruff says, to look for good results when a large number of officials are to be chosen. Therefore, only a few—sometimes one, called a Manager or Director,—are elected by popular vote. They act within the sphere of the broad authority conferred upon them by the Legislature in the "concise easily understood frame of government," exercising that "power to fill up the details" referred to by the Supreme Court in the Grimaud case. Thus have we returned in this field of municipal government to the ideals of the framers of the Constitution of the United States, who devised a scheme of government adequate for that of a union of forty-eight States, embracing a population of nearly an hundred million people, and possessions beyond the seas, in thirty-two printed pages, small octavo—(including the first ten amendments), containing only 4938 words,—leaving Congress and the other branches of government *"with power to fill up the details."* This reversion to early principles is all the more remarkable as it is coincident with the growth to inordinate length of recent State constitutions, such as that of Oklahoma, which fills seventy closely printed octavo pages, divided into 24 articles and 312 sections, and that of Arizona, which is longer, none of which leaves any *details* of consequence to be filled in, but which, on the contrary, to quote the language of the Supreme Court of Vermont[20] "descend to those details * * * which have resulted in discussions calculated to debilitate government itself."

The Commission form of city government certainly has the merit of simplicity. It has thus far resulted in vastly increased efficiency and great economy in municipal government. But it is framed upon a principle which is essentially non-Democratic. It is successful because it embodies that blending of Democracy and Aristocracy which, as Faquét says, makes a good constitution.

The demonstrated success of the Commission form of municipal government not only has stimulated and strengthened the movement towards the adoption of the short ballot,—that is the great reduction in the number of elective offices—for the State governments, but its progress has been coincident with the steady growth in number of other administrative commissions, dealing with many different fields of activity, and the amplification of their powers.

The prototype of this form of governmental organ is the Interstate Commerce Commission of the United States, reproduced in more or less modified form, in Public Service Commissions in the different States. The constitutionality of the devolution upon the Interstate Commerce Commission of plenary power to carry out the Congressional mandate that railroad rates for transportation in interstate commerce shall be just and reasonable and non-discriminatory both as to persons and localities, has been upheld in a familiar line of decisions.

Of the forty-eight State commissions, with independent personnel, representing forty-five separate jurisdictions, enumerated by Professor Sharfman in his survey of legislation on the subject, published in the Annals of the American Academy of Political and Social Science for May, 1914, he shows that twenty-seven are appointed by the governor, by and with the advice and consent of the Senate

[20] *Sabre vs. Rutland R. R. Co.*, 85 Atlantic R., 693.

or council; one is appointed by a railroad board, or a majority of its members, consisting of the governor, the lieutenant governor and the attorney-general; and twenty are elected by the people.

Professor Sharfman adds:

"It is generally recognized that the appointive commission, all else being equal, is likely to call into the public service better and abler men than the elective commission. And there is a strong tendency towards the appointive commission. Not only is a clear majority of the commissions appointive, but all the States which legislated during the past year" (including Idaho, Illinois, Indiana, Massachusetts, Montana, Ohio, Pennsylvania and West Virginia) "created appointive commissions."

All of these commissions have to do with so-called "public utilities," such as railroads, telegraph and telephone lines, water, gas and electric companies and the like.

Their constitutionality has been sustained by reasoning analogous to that employed with reference to the Interstate Commerce Commission. Such a law recently enacted in Vermont was analyzed and described by the Supreme Court of that State[20] in the following language:

The Public Service Commission,

"is an administrative body, clothed in some respects with functions of a judicial nature, *quasi* judicial functions, they may be called, authorized in the exercise of the police power, to make rules and regulations required by the public safety and convenience, and to determine facts upon which existing laws shall operate. In a sense it has auxiliary or subordinate legislative powers; for while the supreme legislative power cannot be delegated, there are many powers so far legislative that they may properly be exercised by the Legislature, which may nevertheless be delegated * * * The functions of an administrative officer or body may be to a large extent judicial and regulative in character. * * * The provision for keeping the departments of government separate does not mean an absolute separation of

[20] *Sabre vs. Rutland R. R. Co.*, 85 Atlantic R., 693.

functions; for if it did, it would really mean that we are to have no government, whereas our Constitution was ordained for the establishment of efficient government."

In addition to those bodies, in several of the States, commissions have been created to regulate the employment, hours of labor, and in some instances the compensation of women and minors[21]:

Commissions to prevent accidents to workmen by prescribing and enforcing regulations concerning machinery, safety device, etc.[22]

Commissions to regulate and enforce Workmen's Compensation acts: *e. g.* those adopted in the States enumerated in the margin.[23]:

Boards of Commissioners of Public Health and Civil Service Commissions are familiar examples.

[21] Wisconsin Industrial Commission (1912).
Washington Industrial Welfare Commission (1913).
California Industrial Welfare Commission (1913).
Oregon Industrial Welfare Commission (1913).
Colorado Wage Board (1913).
Massachusetts Minimum Wage Commission (1912).
Minnesota minimum Wage Commission (1913).
Nebraska Minimum Wage Commission (1913).
Ohio Industrial Commission (1913).

[22] Pennsylvania Industrial Board (1913).
New York Industrial Board (1913).
California Industrial Accident Commission (1913).
Massachusetts Board of Labor and Industries (1913).
Oregon Industrial Accidents Commission (1913).
Texas Industrial Accident Board (1913).

[23] New York, 1913.
Kansas, 1911.
California, 1913.
Connecticut, 1913.
Illinois, 1913.
Iowa, 1913.
Massachusetts, 1911.
Michigan, 1913.
Washington, 1911.
West Virginia, 1913.

In the State of New York, we have, besides the two Public Service Commissions, a variety of commissions and boards exercising various powers, legislative and administrative, including, among others, a State Board of Regents, a Civil Service Commission, Conservation Commission, Department of Efficiency and Economy, Public Health Council, Industrial Board, Workmen's Compensation Commission, a State Board of Pharmacy, a State Athletic Commission, and a Board of Charities. Most of these boards and commissions are appointed by the Governor, by and with the advice and consent of the Senate.

Questions as to the constitutionality of powers granted to administrative commissions, or the method of their exercise, have arisen, not only with respect to the general subject of the delegation of legislative power, but under the fourteenth amendment to the federal constitution, when it is contended such statutes, or acts pursuant to them, constitute an abridgment of the privileges or immunities of citizens of the United States, or authorize proceedings which are not due process of law, or involve a denial of the equal protection of the law to all persons within the jurisdiction of the State by which the legislation is enacted.

"It has always been a part of the judicial function" said Justice BREWER, in passing on the constitutionality of the Texas Railroad Commission Act, "to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property."[24]

But, it has been held that *due* process is not necessarily *judicial* process; that "whether jurisdiction over particular classes of cases is vested in one tribunal or another," is a "question of local law, and there is no provision of the Federal Constitution prohibiting the State legislature from

[24]*Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, 399.

distributing jurisdiction as it sees fit among courts and other tribunals."[25] The United States Supreme Court, in *Louisville and Nashville R. R. Co., vs. Garrett,* [26] considered objections made to the constitutionality of a Kentucky statute empowering a commission not only to fix rates, but in special cases, after investigation, to set aside a general prohibition against charging a less rate for a long haul than for a short haul contained within the longer distance, and to permit a less charge for the greater than for the shorter distance, upon the ground that the Commission would be required in acting under such a law, to exercise judicial functions, whereas by the State Constitution the powers of government were distributed among the legislative, executive and judicial departments, each of which was prohibited from exercising powers belonging to one of the others; and it dismissed the contention by saying that such a hearing and determination would be merely preliminary to the legislative act, and that it was this *consequence* which gave to the proceeding its distinctive legislative character.

"Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government," said Mr. Justice HUGHES, "it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of the hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers. The Legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate, and whether other rates should

[25]McGhee. "Due Process of Law," citing, i. a.: *Reetz vs. Michigan,* 188 U. S., 50; *Nobles vs. Georgia,* 168 U. S. 405; *Church vs. Kelsey,* 121 U. S. 282; *Duncan vs. Missouri,* 152 U. S. 377; *Dryer vs. Illinois,* 187 U. S. 84; *Rogers vs. Peck,* 199 U. S. 425.

[26]231 U. S., 298.

be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' "

In general, a very great scope has been allowed in the nature and extent of powers which may be delegated by the legislature to boards and commissions such as those mentioned. The line has been drawn at the delegation of power without any fixed legislative rule, standard or criterion to control its exercise.

Thus a series of decisions has held invalid statutes purporting to empower insurance commissioners to draft uniform policies of fire insurance and amend them at any time thereafter, the use of any form of policy except those so adopted being prohibited. This was characterized by the courts in those cases as a grant of power, not to determine the facts which should make the law operative, but to make the law itself.[27] On the other hand, it has been held constitutional to create racing commissions with power to prescribe rules and conditions under which horse racing may be conducted, and to grant and revoke licenses to associations to conduct racing.[28]

In a Minnesota case[29] it was held that a statute which attempted to authorize a commission in its judgment to allow an increase of the capital stock of a corporation for such purpose and on such terms and conditions as it might deem advisable, was a mere delegation of the law-making power and therefore void. On the other hand, the Supreme Court of New Jersey very recently has upheld the constitutionality of an act which, while providing that

[27]See *King vs. Concordia Fire Ins. Co.*, 140 Mich. 258; *Anderson vs. Fire Ins. Co.*, 59 Minn. 182; *O'Neill vs. Ins. Co.*, 166 Pa. 63; *Dowling vs. Ins. Co.*, 92 Wis. 63.

[28]*State Racing Com. vs. Latonia*, 136 Ky. 173; *Clark vs. Hartford Ag. Assn.*, 118 Md. 608.

[29]*State vs. Gt. Northern Railway Co.*, 100 Minn. 445.

no corporations should be merged or consolidated without the written approval of the Board of Public Utility Commissioners, prescribed no standard or rule by which their determination should be governed.[30] Even in that case the Court said:

"No doubt the action of the Board must be reasonable and not arbitrary, but that is because we will not attribute to the Legislature an intent to exercise or permit the exercise of arbitrary power. The action of the commissioners must have a foundation in reason; it has such foundation when it is based upon the requirement of the corporation act, or upon settled legal principles, and not upon the mere whim of the commissioners."

In *Eubank vs. Richmond*,[31] the United States Supreme Court held a statute of Virginia and an ordinance of the City Council of Virginia void as involving an arbitrary invasion of private rights. The police power, under which the act was upheld in the State Court, "necessarily has its limits" said Justice McKenna,

"and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies may arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher consideration expressed and determined by the provisions of the Constitution. *Noble State Bank vs. Haskell*, 219 U. S. 104. The point where particular interests or principles balance 'cannot be determined by any general formula in advance.' "

The "due process" clause of the federal constitution has been construed as intended "to prevent the *arbitrary* exercise of power, or undue, unjust and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condi-

[30]*American Malt Corporation vs. Public Utilities Com.*, May, 1914, Mss. per SWAYZE, *J.*

[31]226 U. S. 137.

tion of remaining a member of society."[32] Much of this species of legislation has been upheld under the police power; that power which, according to the Supreme Court of Washington, "is to the public what the law of necessity is to the individual. It is comprehended in the maxim *'Salus populi suprema lex.'* It is not a rule it is an evolution."[33]

The Court of Appeals in New York has held that to justify the State in interposing its authority in behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. "The legislature may not," said Judge Haight, "under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual or unnecessary restrictions in lawful occupations."[34]

But, as Justice McKenna said in delivering the opinion of the Supreme Court in *Metropolis Theatre vs. Chicago.*[35]

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones, and may justify, if they do not require, rough accomodations —illogical, it may be, and unscientific * * * What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of judgment are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void under the Fourteenth Amendment."

The extent of the power of judicial review over the orders and proceedings of the Interstate Commerce Commission was stated by the Chief Justice in *Interstate Commerce Commission vs. Illinois Central R. R. Co.,*[36] to require the consideration of

> "all relevant questions of Constitutional power or right; all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and * * * whether, even although the order be in *form* within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Accordingly the Court has held that a finding by the Interstate Commerce Commission without any evidence is arbitrary and baseless,[37] that an Act of Congress granting authority to anybody to make a finding without evidence would be inconsistent with justice and an exercise of arbitrary power prohibited by the Constitution. The Government in the case resulting in that decision had insisted that under the provisions of the Hepburn Act, Section 15, the Commission was empowered to set aside rates, if after a hearing it should be of the opinion that the charge would be unreasonable, and that an order based on such an opinion was conclusive and could not be set aside, even if the finding was wholly without substantial evidence to support it.

But the Court held that the statute gave the right to a full hearing, and at the same time imposed upon the Commission the duty of deciding in accordance with the facts proved; that if the Government's contention were correct,

[32] *State ex rel. Davis-Smith Co., vs. Clausen,* 117 Pacific Rep. 1101-6 (Wash).

[33] *State vs. Wash. Timber Co.,* 135 Pac. Rep. 546.

[34] *Fisher vs. Woods,* 187 N. Y. 90.

[35] 228 U. S. 61, 69.

[36] 215 U. S. 452.

[37] *I. C. C. vs. L. & N. R. R. Co.,* 227 U. S. 88.

"it would mean that the Commision had a power possessed by no other officer, administrative body or tribunal under our government. It would mean that where rights depended upon facts the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exercised in another; is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power."

So also, a State statute giving a railroad commission power to fix rates which should be conclusive and beyond the power of any court to review, was held by the Supreme Court unconstitutional as violating the due process clause;[38] and where a statute authorized a State commission "after a full hearing" to order railroads to make connections, and made such orders subject to review by the courts, but only on the evidence adduced before the Commission, the Supreme Court held that the due process clause was not satisfied by the granting of a mere hearing, but that the carrier must have the right to know the nature of the complaint made, to present arguments and evidence, and to cross-examine witnesses on the other side; but it held also that the due process clause is not offended by the requirement that the courts limit their review to the evidence before the Commission, provided the carriers are there given a fair and full hearing.

Following the decision of the Supreme Court in the *Proctor & Gamble* case,[39] denying the right of courts to review so-called negative orders of the commission—that is, orders merely refusing relief and denying or dismissing petitions—there appeared to be some disposition on the part of the Commission to endeavor to bring its decisions within that ruling and to avoid their review in the courts by merely writing opinions without entering formal orders, or by so framing its decisions as to result in a dismissal

[38] *Chicago, etc. Ry. vs. Minnesota,* 134 U. S. 418.

[39] 225 U. S. 282.

of the petition, even where the subject matter dealt with involved a new and important extension of the powers of the Commission, injuriously affecting substantial private rights. But, happily, wiser counsel prevailed, and a different principle was followed in the so-called *Tap-line* cases. The recent decision of the Supreme Court in those cases (*United States vs. Louisiana & Pacific Railway Co.,* decided May 25, 1914[40]), which reversed the orders of the Commission affecting the status of certain branch or lateral lines of railroad, constructed primarily for the transportation of lumber from the forests to points of connection with trunk line railways, and used also to a certain extent for general traffic, confirms the advisability of the Commission refraining from the undue extension of its *quasi*-legislative powers without giving an opportunity for the fullest possible review of its orders by the courts. Moreover, the latest utterance by the Supreme Court (in the *Intermountain Rate Case*[41]) affords reason to believe that that court would always discover a method of reaching and restraining an arbitrary abuse of power by the Commission; for the Court took pains to point out that the doctrine established in its previous decisions, of the finality of findings of fact made by the Commission within the scope of its administrative duties,

"does not relieve the courts in a proper case from determining whether the Constitution has been violated, or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

[40] 234 U. S. 1.

[41] United States vs. Atchison, Topeka and Santa Fé Railway Co., *et. al.,* 234 U. S. 476.

In view of the recent tendency in Congress to use administrative bodies, such as those under discussion, purely, or largely for purposes of investigation, and through them to secure publicity of the affairs of corporations or others under the ban of popular suspicion, or to create new commissions largely, if not exclusively, for purposes of investigation, it becomes important to consider what, if any, limitations upon the powers of administrative commissions to compel the production of papers and the testimony of witnesses, exist in State or Federal Constitutions. The Fourth and Fifth Amendments to the United States Constitution, constituting limitations upon Federal power, declare the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, and that no person shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; while the Fourteenth Amendment prohibits States from making or enforcing laws which shall deprive any person of life, liberty or property without due process of law. Very broad construction has been given to these provisions in a line of cases beginning with the *Boyd* case.[42] The point was considered specifically with respect to the powers of the Interstate Commerce Commission in the *Brimson* case[43] and the *Harriman* case.[44] In the case first mentioned, the power of Congress to establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses and require the production of books, documents and papers relating to that subject, was declared to be beyond dispute; but it was also held that:

"Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or

[42]*Boyd vs. United States,* 116 U. S. 616.

[43]*U. S. vs. Brimson,* 154 U. S. 447.

[44]211 U. S. 407.

can be invested with a general power of making inquiry into the private affairs of the citizen."

Mr. Justice HARLAN, speaking for the Court, said:

"We said in *Boyd vs. United States,* 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacy of his life."

In the *Harriman* case, the Court held that the purposes of the Interstate Commerce Act, for which the Commission might exact evidence, embraced only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made a subject of complaint; that the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose for which the Commission was established was to enforce the regulations enacted.

"These," said Justice HOLMES, "in our opinion are the purposes referred to; in other words, the power to require testimony is limited, as it usually is, in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law."

In the very recent case of *Weeks vs. United States,*[45] a conviction for violation of a provision of the criminal code of the United States was set aside and a new trial ordered, because the United States Marshal had entered a room in a boarding house occupied by the defendant and taken from a drawer in a chiffonier, certain letters which had been written to the defendant and which tended to show his guilt, and these letters had been admitted in evidence against the defendant on his trial, over his objection, and against his demand that they be returned to him. The principle of the *Boyd* case was reaffirmed, and the Court, speaking by Justice DAY, said:

[45]232 U. S. 383.

"The effect of the Fourth Amendment is to put the Courts of the United States and the Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the Courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

The same principle is applicable to corporations as well as to individuals, because, as the Supreme Court said in *Hale vs. Henkel*:[46]

"A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation, it can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment against unlawful discrimination. * * * Corporations are a necessary feature of modern business activity and their aggregated capital has become a source of nearly all great enterprises."

The decision in that case (since followed, and emphasized in *Wilson vs. United States*[47]), to the effect that an officer of a corporation may not refuse to produce books, papers, correspondence, etc., belonging to the corporation,

[46]201 U. S. 43.

[47]221 U. S. 361. See also *Wheeler vs. U. S.*, 226 U. S. 478.

when subpœnaed in aid of a proper legal inquiry, upon the ground that they may tend to incriminate him, nevertheless held that even an order for the production of books and papers before a Grand Jury in aid of an inquiry into an alleged crime, may constitute an *unreasonable* search and seizure, against which a corporation as well as an individual is protected, under the Fourth Amendment; and the subpœna which had been issued in that case was held to be far too sweeping in its terms to be regarded as reasonable.

In view of these decisions, it may be seriously questioned whether the general unrestrained powers of investigation, sought to be conferred by Congress upon a so-called administrative body, created merely for general purposes of investigation, would be upheld by the courts, or, in any event, allowed beyond the limits of requiring the production of documents bearing upon some special point properly under inquiry, which documents are sufficiently identified to bring the order within the rule laid down in *Hale vs. Henkle* and *Wilson vs. United States.*

Most of the State constitutions contain provisions against unreasonable search and seizure similar to those in the Federal Constitution. Some,—for example, the Constitution of New York,—do not. In the latter State, a provision in the Civil Service Law authorized the State Civil Service Commission to investigate and report alleged violations of its provisions by a State officer in levying or allowing the levy of political assessments. The New York Court of Appeals held that the duties of the Commission were administrative, and not judicial; that its functions were strictly analagous to those of a legislative commission of inquiry or investigation, and that it was not a valid objection to such investigation that it might disclose crime or wrong-doing on the part of individuals, provided its object was the framing or enactment of proper laws or regulations.

The Act of Congress creating the Bureau of Corporations was framed in view of a similar distinction; it authorized the Bureau to gather such information and data as should enable the President to make recommendations to Congress for legislation for the regulation of interstate and foreign commerce.

The pending legislation now before the United States Senate, at least in the form in which it passed the House of Representatives, contemplates a wider scope of inquiry, and the passage of such bill will undoubtedly lead to legal controversies and a delimitation of the powers of the proposed trade commission, which will protect corporations and individual citizens alike in the continued enjoyment of the immunity from unreasonable searches and seizures of their private books and papers secured to them by the Constitution.

To what extent the doctrine that the police power operates as a limitation upon or modification of constitutional restrictions which otherwise would limit the permissible scope of the delegation of powers to an administrative commission, is beyond the proper bounds of this address. Under a written constitution, as Justice McKENNA says in his dissenting opinion in the *Pipe Line Cases* (*U. S. vs. Ohio Oil Co., et al.*,[48]):

"There is a sovereignity superior to the legislature, that of the people expressed in the Constitution. How to reconcile legislation with the limitations of the Constitution and leave Government practical in its exercise is a problem which comes to this court often.* * * It is to be regretted that there is no indisputable standard for its solution—no indisputable test of due process of law. We know that an act of legislation does not necessarily satisfy it. It may however be sufficient, or to be more careful and accurate, there may be a regulation of the uses of property whose legality cannot be denied."

Justice HOLMES in a recent opinion, to which reference is constantly made, said:

[48]234 U. S. 548.

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposite sides."[49]

It may seem rather anomalous that while, as was said in one case, "Neither the 'contract clause' nor the 'due process' clause" of the Fourteenth Amendment

"has the effect of overreaching the powers of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community;"[50]

an ordinance adopted in the exercise of the police power by a city, providing for the licensing of drivers of express wagons, should be held void, because, in the opinion of the Court, the exercise of the police power "does not justify the imposition of a direct burden on interstate commerce."[51] The reason, however, may be found in the consideration that restrictions upon the powers of government as affecting individual rights, are to be taken as qualified by a recognition of the superior power left in the State, as necessary to the continuance of practical government.

"All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called 'internal police' are not thus surrendered or restrained" (i. e., by the provisions of the Fourteenth Amendment), "and consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."[52]

Whereas, the grant to Congress to regulate interstate and foreign commerce is complete, comprehensive and exclusive

[49]*Noble State Bank vs. Haskell*, 219 U. S. 104; 113; See also for examples of the extreme application of the police power: *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, 542; *Atlantic Coast Line vs. Goldsboro*, 232 U. S. 548, 558.

[50]*Atlantic Coast Line vs. Goldsboro*, 232 U. S. 548, 558.

[51]*Adams Express Co. vs. New York*, 232 U. S. 14, 32; see also *Erie R. R. Co., vs. N. Y.*, 233 U. S. 671.

[52]*City of New York vs. Milne*, 11 Peters, 102, 139.

of any power over the same subject in the States. The reasoning of the cases may not seem wholly satisfactory, but if the law of the police power, as frankly recognized in some cases, is the law of necessity, so far as provisions for the health, safety or welfare of the inhabitants of a State are concerned, the comprehensive control of our interstate commerce by the national government is no less a law of necessity for the conduct under uniform rule of the commerce of a great nation.

I have not attempted an exhaustive statement of all the legal principles, still less of every decision affecting the powers of Congress or of State Legislatures to create and devolve powers upon Administrative Commissions. I have sought merely to illustrate the general principles of law involved in the very widespread and significant modification in our system of government resulting from the rapid growth and multiplication of bodies of this character.

This discussion, however, would be incomplete, without a reference to the field of possible legislation opened up by the recent decision of the United States Supreme Court in *German Alliance Insurance Co. vs. Kansas,*[53] where a statute of the State of Kansas authorizing the Superintendent of Insurance of that State to determine any rate of insurance to be excessive or unreasonably high, or not adequate to the safety or soundness of the company, and thereupon to direct the company to publish and file a higher or lower rate which should be reasonably commensurate with the character of the risk, was upheld, on the authority of *Munn vs. Illinois.*[54] The minority of the Court who dissented, sought to limit the power of the State to fix prices, to cases involving the use of property which had been dedicated by its owner to a public use. The majority rejected this distinction as unsound, holding that a business, by circumstances and its nature, may become a matter of public concern and

[53]233 U. S. 390.
[54]94 U. S. 390.

be subject in consequence to governmental regulation; that the business of insurance was of that nature, and was therefore the legitimate object of the exercise of the police power by the State, and that this exercise might extend to the control of the prices to be charged for writing insurance.

Justice McKenna placed the decision largely upon the ground that the business of insurance had become "clothed with a public interest," and therefore subject to be controlled by the public for the common good.

It would seem that a better basis for the decision is found in the principle that where by reason of the organization, complexity and nature of the business, the public, who are compelled to accept what is offered, whether it be transportation or insurance, has no option but to take the terms fixed by those who offer, or go without the needed facility or commodity, is entitled to protection by public authority. Justice McKenna adverts to this principle, if he does not rely upon it, when he says:

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the Legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or, be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of

bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power."

The same element was found in the *Munn* case. The grain elevators there under consideration were shown to be so connected with each other and the railroads, as to form virtually a monopoly "standing in the very gateway of commerce and taking toll from all who pass." That this monopolistic feature was one of the essential conditions on which the decision rested, is evidenced, not only by Chief Justice WAITE'S opinion, but by references to it subsequently made by almost all of the Justices who concurred in the decision.[55]

With the States free to exercise the power to control prices wherever it may be found that the cost of articles or facilities of general necessity are not fixed by the ordinary operations of the law of supply and demand, we may naturally anticipate examples of price-fixing by legislatures or commissions in other fields than transportation and insurance. The decision of the Supreme Court furnishes, it is true, a new weapon against monopoly, but one in the exercise of which it is to be feared more harm than benefit may result.

Undoubtedly the danger of serious invasion of private rights, of tyrannous exercise of the power of majorities, is far less when power is intrusted to boards or commissions of competent men selected by the President or by the Governors of States, to act only after thorough study of the subject involved, and upon hearing of the parties affected, than when Congress or the Legislature itself attempts to legislate as to details which few of its members understand, and in disregard of rights they have not, and in the nature of things cannot have, thoroughly investigated. But the

[55]See "The Power of the State to Regulate Prices and Charges," by Hon. G. A. Finkelburg, 32 Am. Law Rev., 501; *Budd vs. N. Y.*, 143 U. S. 517, 537; *State ex rel. vs. Associated Press*, 159 Md. 410, 455.

constant supervision of the judicial branch of the government is necessary to keep such bodies within their appointed powers, and to preserve a respect for constitutional rights. Without the existence of that judicial power, an otherwise great improvement in governmental function might readily become a Briareus-armed tyrant, wielding authority—to employ Chief Justice WHITE'S language in the *Intermountain* rate case—in "the uncontrolled exuberance of vague and destructive powers."

END OF
TITLE